

tioners realise fully its implications and advise their clients accordingly.

On the evidence and in the circumstances of this case, it is clear that "a later date" meant in the intention of the parties a reasonable time after the loan had been approved and it is an irresistible conclusion that the appellant had never been willing to complete.

For these reasons, we agree with the judgment for specific performance but the further order that the Senior Assistant Registrar of the High Court be empowered to execute the transfer on behalf of the appellant should be qualified by a provision that this order is to take effect upon her refusal or failure to do so. There should also be a further order that the balance of the purchase should be paid into court upon the execution of the transfer by the appellant or by the Senior Assistant Registrar on her behalf and the due registration of the transfer and the charge.

Subject thereto, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Ajmer Singh Sandhu & Co.*

DAISHOWA (M) WOOD PRODUCTS SDN. BHD. v. KEPONG WOOD PRODUCTS CO. SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.J.J.) November 7, 1979 & February 26, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 133 of 1977]

Contract — Breach — Damages — Quantum of damages — Whether appellate court should interfere with assessment of trial judge — Damages for anticipated loss of profit — Agreement unlikely to be renewed — Loss of profit during renewal period not loss reasonably foreseeable as liable to result from breach — Deduction for tax — Whether award trading receipt or capital payment — Damages reduced — Contracts Act, 1950, s. 74.

Revenue Law — Damages for breach of contract — Whether trading receipt or capital payment — Tax liability — Whether damages should be reduced — Income Tax Act, 1967, s. 4.

This was an appeal from the decision of Abdul Hamid J. reported at [1979] 1 M.L.J. 195. At the hearing of the appeal liability was admitted and it was conceded that the appellants were not entitled to terminate the agreement and that the respondents were entitled to damages under section 74 of the Contracts Act. The only question on the appeal and the cross-appeal was the quantum of damages. The main contention of the appellants was that the learned Judge did not deal with tax and did not take this into account in awarding damages.

Held: (1) on the facts the learned trial judge was right in finding that the agreement was unlikely to be renewed. The loss of profit during the renewal period could not therefore be said to be a loss reasonably foreseeable as likely to result from the breach and the learned trial judge was right to dismiss the respondent's claim for damages for anticipated loss of profit during the renewal period;

(2) in the present case the payment to the appellants was more in the nature of capital payment than of trading receipts. Once the appellants terminated the contract the structure of respondent's business was affected and their business virtually came to an end;

(3) the estimate of damages by the learned trial judge was erroneous due to the omission to make any deduction

for tax and the respondents were therefore awarded more than they were entitled;

A (4) the amount of damages awarded should be reduced by \$250,000.

Cases referred to:-

- (1) *Hadley v. Baxendale* (1854) 9 Ex. 341; 156 E.R. 145.
- (2) *Victoria Laundry (Windsor) v. Newman Industries Ltd.; Coulson & Co. Ltd. (Third Parties)* [1949] 2 K.B. 528.
- B** (3) *In re Vic Mill Ltd.* [1913] 1 Ch. 465.
- (4) *Silkstone and Dotsworth Coal and Iron Co. Ltd. v. Joint Stock Coal Co. Ltd.* (1876) 35 L.T.R. 668.
- (5) *Interoffice Telephones Ltd. v. Robert Freeman* [1958] 1 Q.B. 190.
- (6) *Robophone Facilities Ltd. v. Blank* [1966] 3 All E.R. 128.
- G** (7) *British Transport Commission v. Gourley* [1956] A.C. 185.
- (8) *Beach v. Reed Corrugated Cases Ltd.* [1956] 1 W.L.R. 807.
- (9) *Hall & Co. Ltd. v. Pearlberg* [1956] 1 W.L.R. 244.
- (10) *West Suffolk County Council v. W. Rought Ltd.* [1957] A.C. 403.
- (11) *Inland Revenue Commissioners v. Newcastle Breweries* (1927) 12 T.C. 927.
- D** (12) *J. Gliksten & Son v. Green* [1929] A.C. 381.
- (13) *I.B. Drennan v. R.F. Greer* [1957] M.L.J. 77.
- (14) *S.R. Fox v. Ek Liong Hin Ltd.* [1957] M.L.J. 1.
- (15) *Raja Mokhtar bin Raja Yaacob v. Public Trustee Malaysia* [1970] 2 M.L.J. 151.
- (16) *Yeap Cheng Hock v. Kajima-Taisei Joint Venture* [1973] 1 M.L.J. 230.
- E** (17) *Raja's Commercial College v. Gian Singh & Co.* [1975] 1 M.L.J. 54.
- (18) *Barr, Crombie & Co. Ltd. v. C.I.R.* 26 T.C. 406, 412.
- (19) *De Lasala v. De Lasala* [1979] 3 W.L.R. 390.
- (20) *Lim Poh Choo v. Camden and Islington Area Health Authority* [1979] 3 W.L.R. 44.
- (21) *Flint v. Lovell* [1935] 1 K.B. 354, 360.
- (22) *Davies & Anor. v. Powell Duffryn Associated Collieries Limited* [1942] A.C. 601.
- F** (23) *Nance v. British Columbia Electric Railway Company Ltd.* [1951] A.C. 601.

FEDERAL COURT.

Peter Mooney for the appellant.

M. Shanker (E. Yong and S. Woodhull with him) for the respondent.

G *Cur. Adv. Vult.*

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This appeal is against the decision of the learned judge in awarding \$938,745.14 as damages for breach of contract.

Both appellants (Daishowa) and respondents (Kepong Wood) are companies incorporated in Malaysia. Respondents operated a factory at 6½ Mile Kepong, Kuala Lumpur. In 1970 appellants had installed two chipping plants in the factory. It was not until January 17, 1974 that they entered into a written agreement whereby appellants agreed for a period of five years to purchase all wood chips produced by respondents on certain terms and conditions. The agreement was renewable at the option of either party giving two months' notice to the other. Clause 2 states that respondents are responsible for all costs of producing wood chips and maintenance of the plants. Under Clause 3 the purchase is stated to be \$18 per long ton of 2,240 lbs. but shall be increased propor-

tionately from time to time if the cost of fuel, raw materials or labour should increase by 20% in a period of twelve months. Clause 5 states that respondents shall produce not less than 24,000 long tons of wood chips per year at the minimum of 2,000 long tons of wood chips per month. Under Clause 9 appellants are to provide sufficient lorries to take delivery of wood chips from the factory.

By mutual agreement the price was adjusted from time to time according to demand. On the very date of the agreement by a letter appellants agreed to pay respondents an incentive rate of \$21.50 for every ton in excess of 2,000 tons in any calendar month. From July 1, 1974 appellants agreed to pay \$23 per ton up to 2,000 tons and an incentive rate of \$26.50 for every ton in excess of the 2,000 tons in any calendar month. In May 1974 appellants requested respondents to increase production to at least 2,300 tons per month. In compliance with the request respondents bought certain machinery hoping to increase production capacity to at least 3,000 tons per month as from April 1975. Sometime after July 1974 although respondents disapproved the request of appellants to cut down production for a temporary period of three months from October to December they co-operated with appellants for the sake of goodwill. Their hope to resume normal production from January 1975 was dashed by unsatisfactory transport arrangements made by appellants. Following a complaint by respondents a meeting was held. Respondents were told to reduce production by 80% per month. Naturally, respondents were shocked as at that tonnage they would go bankrupt. Appellants gave respondents to understand that that was a demand not a request. So, respondents left the meeting. On March 17, 1975 appellants wrote to respondents countermanding the earliest request to increase production by asking respondents to reduce production to 500 tons per month as from April 1975 until market condition recovered. In May 1975 respondents went to Japan to see the Daishowa executives. On their return appellants assured respondents they would be taking delivery of 1,500 tons per month. At the same time respondents received \$30,000 to help them solve their creditors' problem. Despite the assurance appellants did not take delivery of anything amounting to 1,500 tons per month. Respondents were faced with the problems of large quantity of waste wood stockpile and workers idling away. So, in desperation they wrote to the Director-General of the Economic Planning Unit to help solve the matter. In retaliation appellants wrote to respondents on August 29, 1975 informing respondents that they were no longer bound by the terms of the agreement and since then they had taken no delivery of wood chips. Consequently, respondents sued appellants for breach of contract claiming damages in the sum of \$3,514,000. This sum is arrived at by adding two items — (a) loss of profit from April to August 1975 at \$214,000 and (b) estimated loss of profit from September 1975 to December 1983 at \$3,300,000.

The learned judge found appellants to be in breach of the agreement and liable for damages. He assessed damages on the said two items. He disagreed that profit should be based on production of 2,800 tons

per month. Having regard to factors affecting production, such as, timber slump, monsoon and the quantity produced four years preceding 1975 he considered 29,000 tons per year to be a fair estimate of average quantity respondents would be capable of producing per year. On this figure he proceeded to assess damages on the basis of an incentive rate of 400 tons in excess of 2,000 tons per month by reference to accounts exhibited (Exhibits P3 and P16). For item (a) he reached a figure of \$283,000 by adding the sums derived from $(2,000 \times 5 \times \$23,000 = \$230,000)$ and $(400 \times 5 \times \$26.50 = \$53,000)$. From \$283,000 he deducted expenditure of \$171,168.72 giving a balance of \$111,831.28. The audited account (Exhibit P3) shows a loss of \$49,713.86 for period from April to August 1975. He thereby added \$49,713.86 to \$111,831.28 making a total of \$161,545.14 which is the sum he awarded under item (a). On the basis that the loss of profit for five months was \$111,831.28 he calculated that the loss of profit per month worked out at roughly \$22,366.25 which he then multiplied by 40 months 18 days arriving at a round figure of \$908,069.75 for item (b). By using a multiplier followed by courts in running down cases in calculating the value of an annuity allowing interests at various rates, based on loss of \$1,000 per month calculated over a period of three years, he produced a figure of \$32,640. In other words there is a 10% deduction. Applying that formula he assessed damages for item (b) at \$807,200. He then added \$161,545.14 to \$807,200 and from the total he deducted \$30,000 giving a balance of \$948,745.14 which is the amount he awarded respondents as damages. It is not in dispute that the figure \$807,200 should really be \$817,200. Therefore, the amount awarded should be \$948,745.14.

At the hearing liability was admitted. It was conceded that appellants were not entitled to terminate the agreement and that respondents were entitled to damages under section 74 of the Contract Act. It may be mentioned that respondents do not dispute that appellants are entitled to set-off \$30,000. So, the only question in this appeal and the cross-appeal is the quantum of damages.

It is convenient at this point to deal with respondents' cross-appeal on claim for damages for anticipated loss of profit during the renewal period. Under the agreement the option of renewal for another five years may be exercisable by either party. The renewal is supposed to be on the same terms and conditions as the parties originally agreed. From the evidence the purchase price had been varied from time to time according to demand. It is doubtful if respondents would accept the purchase price of \$18 per ton at the time of renewal. The learned judge was perfectly right in finding that in the circumstances the agreement was unlikely to be renewed. *Hadley v. Baxendale*⁽¹⁾ and *Victoria Laundry (Windsor) v. Newman Industries Ltd.; Coulson & Co. Ltd. (Third Parties)*⁽²⁾ were cited and relied upon by the learned judge to reach the conclusion that the loss of profit during the renewal period could not be said to be a loss reasonably foreseeable as liable to result from the breach. The learned judge was right to dismiss

respondents' claim for damages for anticipated loss of profit during the renewal period.

Although Mr. Mooney for appellants did not question the basis of assessment he submitted that the learned judge made too modest a deduction. The deduction should be more reasonable so as to provide for contingencies, such as, decreasing quotient, depreciation of plants and mitigation. The life of a plant was only ten years. As time went on the production would go down and not up. When the contract was terminated the respondents could look for other buyers. The damages should, therefore, be further reduced. On the other hand, Mr. Shanker for respondents submitted that the learned judge was quite right to use the accounts exhibited as the basis for calculating and computing the damages for the purpose of arriving at a global figure. However, they contended that where loss of profit is being computed on a contract there should be no deduction for contingencies if there is evidence of capacity to fulfil the contract and earn the profits. In support they cited *In re Vic Mill Ltd.*,⁽³⁾ *Silkstone and Dotsworth Coal and Iron Co. Ltd. v. Joint Stock Coal Co. Ltd.*,⁽⁴⁾ *Interoffice Telephones Ltd. v. Robert Freeman*⁽⁵⁾ and *Robophone Facilities Ltd. v. Blank*.⁽⁶⁾ Nevertheless, they conceded that they could not object to deduction for ready money and they considered the 10% deduction made by the learned judge to be reasonable. They argued that the learned judge should not have made the deduction on item (a) because the damages were for past losses.

The main contention of appellants is that the learned judge did not deal with taxation. The question of taxation involved income tax and development tax. This is important as assessment was made on loss of profit. Appellants submitted that in an action for damages for loss of profit assessment should be for nett earning after tax and not on gross profit. In support he cited *British Transport Commission v. Gourley*⁽⁷⁾ where plaintiff, a highly successful engineer, was injured by reason of defendant's negligence. The trial judge awarded him gross loss of earnings paying no regard to the income tax he would have had to pay on the amount of such earnings had he not been injured. It was agreed that in England the plaintiff would incur no tax liability on such a verdict. By a six to one decision, the House of Lords reversed the decision of the Court of Appeal and held that the trial judge ought to have taken the tax position into account and that the award in respect of loss of earnings should be reduced to the nett sum after tax. The principle laid down in *Gourley's case*⁽⁷⁾ has been applied in other cases, e.g. of wrongful dismissal: *Beach v. Reed Corrugated Cases Ltd.*,⁽⁸⁾ to damages for mesne profits in an action of trespass: *Hall & Co. Ltd. v. Pearlberg*⁽⁹⁾ and to the assessment of compensation for loss of profits resulting from interference with a business in the exercise of statutory powers: *West Suffolk County Council v. W. Rought Ltd.*⁽¹⁰⁾

It is the contention of respondents that *Gourley's case*⁽⁷⁾ has no application in Malaysia as our income tax law is very broad in concept and, therefore, different. Assuming that the tax law and the English tax law are similar *Gourley's case*⁽⁷⁾ ought to be re-

jected as a matter of policy. Further, the manner in which appellants conducted their case in the court below should preclude them from raising this point in the way it has been argued. Even if the court should rule that *Gourley's case*⁽⁷⁾ is applicable it would still have no relevance because the damages must be treated as a trading receipt and not a payment in substitution of capital asset. In *Inland Revenue Commissioners v. Newcastle Breweries*⁽¹¹⁾ compensation was paid to merchants for rum requisitioned by the Admiralty. The compensation was held to be a trading receipt and liable to be brought into the recipient's profit and loss account for the year. Also, in *J. Gliksten & Son v. Green*⁽¹²⁾ the House of Lords held that money received by a taxpayer company from an insurance company in respect of timber destroyed by fire must be brought into the company's profit and loss account as a trading receipt in order to arrive at the company's profits for income tax purposes. The amount received was treated as a gain of the company in the course of its business no less than the sale price of the timber would have been, if sold in the course of ordinary sales in the company's business.

The issue is the proper assessment of damages. In *Gourley's case*⁽⁷⁾ Lord Jowitt stated at page 203:—

"My Lords, I agree with Lord Sorn in thinking that to ignore the tax element at the present day would be to act in a manner which is out of touch with reality. Nor can I regard the tax element as so remote that it should be disregarded in assessing damages. The obligation to pay tax — save for those in possession of exiguous incomes — is almost universal in its application. That obligation is ever present in the minds of those who are called upon to pay taxes, and no sensible person any longer regards the net earnings from his trade or profession as the equivalent of his available income. Indeed, save for the fact that in many cases — though by no means in all cases — the tax only becomes payable after the money has been received, there is, I think, no element of remoteness or uncertainty about its incidence."

The dominant rule is that the appellant should have his damages assessed upon the basis of what he had actually lost and in determining what he had really lost, the learned judge ought to have considered the tax liability of the appellant. The principle has been applied in the courts both here and in Singapore. See *I.B. Drennan v. R.F. Greer*,⁽¹³⁾ *S.R. Fox v. Ek Liong Hin Ltd.*,⁽¹⁴⁾ *Raja Mokhtar bin Raja Yaacob v. Public Trustee Malaysia*,⁽¹⁵⁾ and *Yeap Cheng Hock v. Kajima-Taisei Joint Venture*.⁽¹⁶⁾ Only recently in *Raja's Commercial College v. Gian Singh & Co.*⁽¹⁷⁾ Wee Chong Jin C.J. (Singapore) distinguished *Gourley's case*⁽⁷⁾ and *Hall & Co. Ltd. v. Pearlberg*⁽⁹⁾ by pointing out that the amount awarded to respondents as mesne profits was liable to Singapore income tax as "any other profits arising from property" under section 10(1)(f) of the Income Tax Act and, therefore, there was no reason to reduce the damages awarded.

Whether the damages are taxable or not is a matter for the court. If they are taxable then *Gourley's case*⁽⁷⁾ has no application. If they are not, then *Gourley's case*⁽⁷⁾ applies and a deduction would have to be made. The Revenue loses nothing and appellants would be paying respondents no more or less what they would have earned had the contract continued.

It was said that income tax would not be payable

until sometime after the money had been earned or received by respondents. It was also said that the P.A.Y.E. scheme is not in force here. The distinction between the case of money being deducted before payment of tax and the case of paying tax only after receipt of money is really immaterial once the principle in *Gourley's case*⁽⁷⁾ is applicable. The fact that the courts have never been invited to apply the principle is not a sound reason for not applying it.

Whether the award is trading receipt or capital payment depends upon the particular facts of the case. In the present case appellants supplied respondents with two chipping plants since 1970 for the production of wood chips. These chips were to be sold to appellants and no other. Respondents were tied down by contract. Once appellants terminated the contract the structure of respondents' business would be affected. Their business virtually came to an end. They could not use the chipping plants which belonged to appellants. It was for the same reason that respondents were not in a position to claim a larger amount of depreciation on plant machinery as their accounts (Exhibit P3 and Exhibit P16) show a modest sum for depreciation. Respondents could, of course, convert their business but they would be conducting a totally different business. We agree with Mr. Mooney that the payment to appellants is more in the nature of capital payment than of trading receipt in the present case. What Lord Normand said in *Barr, Crombie & Co. Ltd. v. C.I.R.*⁽¹⁸⁾ applies aptly to the present case:—

"And where you have a payment for the loss of the contract upon which the whole trade of the company has been built, where the expected profits of the contract are used to measure the loss of them for a period of future years, and where in consequence of the loss the company's structure and character are greatly affected, the payment seems to me to be beyond doubt a capital payment."

Income tax is chargeable only on income. The word "gains" in sections 4(a) and 4(f) would seem to refer to gains by way of income but not gains of a capital nature. We can see no reason why *Gourley's case*⁽⁷⁾ is not applicable, especially now that the authority of the House of Lords has been asserted recently in *De Lasala v. De Lasala*.⁽¹⁹⁾

Mr. Shanker stated that *Gourley's case*⁽⁷⁾ was not even mentioned in *Lim Poh Choo v. Camden and Islington Area Health Authority*.⁽²⁰⁾ There is no necessity to do so since the court assessed the damages on the basis of net income, that is, after tax.

We find it difficult to distinguish the present case from *West Suffolk County Council v. W. Rought Ltd.*⁽¹⁰⁾ where *Gourley's case*⁽⁷⁾ was applied in respect of loss of trading profit. Although respondents claimed for loss of profit in actual fact he was asking for compensation. They should not be allowed to make high profits but should get no more no less than what they truly lost. In other words, the compensation is for their true loss and in assessing it the incidence of tax has to be taken into consideration. The learned judge had this clearly in mind when, in his judgment, at page 136 of the Appeal Record, he said:—

"In arriving at the final figure to be awarded the court should also consider taxation and deduction of enhanced benefit im-

mediately obtainable. (See *McGregor on Damages*, 13th Edition, paragraphs 397 to 423). Apart from this there should also be a discount for lump sum payment on ground of contingencies."

But, the learned judge did not assess the amount of taxation to be deducted. The issue of taxation was not raised in the court below but only brought to the notice of the learned judge after the hearing by way of a letter. He did not have the benefit that we had of hearing argument.

Although an appeal is by way of rehearing an appellate court should be slow in interfering with the learned judge on his assessment of damages unless it is shown that he has acted on a wrong principle of law and that he has made an entirely erroneous estimate of damages. The classic statement on this matter is to be found in the judgment of Greer L.J. in *Flint v. Lovell*⁽²¹⁾ where he said that this court —

"will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

This statement was approved and adopted by the House of Lords in *Davies & Anor. v. Powell Duffryn Associated Collieries Limited*⁽²²⁾ and by the Privy Council in *Nance v. British Columbia Electric Railway Company Ltd.*⁽²³⁾

Just as it is impossible to assess with mathematical accuracy the amount of damages for future earning or profit, so it is also impossible to assess with the same accuracy the reduction to be made for taxation. If the learned judge simply awarded a lump sum without explaining how he arrived at the figure, we would not interfere with the award. But, he had indicated the method he used to arrive at the figure and that figure clearly did not show that deduction for tax had been made though he said it would be taken into consideration. Had there been a deduction for tax the amount awarded would not be so high.

In our judgment due to the omission to make any deduction for tax the estimate of the damages was erroneous as respondents were awarded more than they were entitled. The amount would have to be reduced. The case may be sent back to the learned judge for assessment of taxation or this court could make the assessment. In view of the fact that the matter was raised and argued before this court it would be quite convenient for this court to assess the deduction to the best of its ability. Mr. Mooney has submitted to us three sets of calculations on the tax position of respondents covering the relevant period, taking into account the net loss for the year ended December 31, 1975 as indicated in the audited accounts. A company is liable to income tax of 40% on chargeable income and a 5% for development tax and a further 5% for excess profits tax. The deductions range from over \$300,000 to over \$400,000. He submitted that there should be a 10% deduction for mitigation. As we have pointed out previously the nature of respondents' business was such that they could do

very little, once the contract was terminated because they could not make use of the chipping plants which belonged to appellants. As long as there was demand for wood chips there would be no problem. But, when market condition was bad and demand was lacking respondents were actually at the mercy of appellants. Taking all the factors into consideration it is not unfair to reduce the amount of \$948,745.14 by \$250,000. Respondents are, therefore, entitled to \$698,745.14.

The appeal is allowed with half the costs and the cross-appeal is dismissed with no order as to costs. Deposit to be refunded to appellants. The balance in court to be paid to respondents.

Order accordingly.

Solicitors: *Skrine & Co.; Dato S.M. Yong & Co.*

**SIM SIOK ENG & ANOR. v.
POH HUA TRANSPORT AND CONTRACTOR
SDN. BHD.**

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.)
September 3, 1979 & February 29, 1980]

[Kuching — Federal Court Civil Appeal No. 10 of 1979]

Contract — Sale of Goods — Claim for price of goods — Evidence of account book regularly kept in the course of business — Evidence Act, 1950, s. 34.

Evidence — Sale of goods — Claim for price — Books of account regularly kept in course of business — Corroboration — Evidence Act, 1950, s. 34.

In this case the respondent claimed the sum of \$5,283.25 for goods sold and delivered to the appellants. To support its case the respondent produced its books of accounts kept by it to record its transactions with several customers including the appellants. Evidence was given that the goods were ordered and delivered to the appellant's premises and that the entries in the account books were entered from the invoices. The learned trial judge gave judgment for the respondents and the appellants appealed.

Held, dismissing the appeal: (1) the books of account were regularly kept in the course of business and referred to a matter into which the court had to inquire and were therefore admissible under section 34 of the Evidence Act;

(2) corroboration of the entries in the book of account were to be found in the book of account itself, in the admission by the appellants which tallied with the first four entries relating to them and in the oral evidence relating to the order and the supply of the goods.

Cases referred to:-

- (1) *Kesheo Rao v. Ganesh* A.I.R. 1926 Nag. 407.
- (2) *Deputy Commissioner Barabanki v. Munshi Ram Parshad* (1898) 26 I.A. 254.
- (3) *Jaswant Singh v. Lala Sheo Narain Lal* (1893-94) 21 I.A. 6.

FEDERAL COURT.

Patrick Tan for the appellants.

S. Sahathevan for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal against the decision of Mr. Justice Seah who gave judgment in favour of the plaintiff, now the respondent in the present appeal.

The first appellant is the sole proprietor of the

second appellant which is a firm carrying on business under the name of Pan Malaysia Construction Company. The appellants obtained a contract from the Federal Government to build a camp for the Police Field Force at 14th Mile Oya Road, Sibul, Sarawak. According to PW1 who was a shareholder and the managing director of the respondent and also in charge of the respondent's account, the first appellant and his clerk ordered goods from the respondent. The goods were delivered to the appellants' worksite at 14th Mile Oya Road in a lorry driven by the respondent's driver. The mandore, presumably a servant of the appellants, who received the goods signed duplicate copies of the invoices accompanying the goods. To support its case the respondent produced exhibits P2(a) and P2(b) which were admitted by the learned judge against the appellants' objection. P2(a) purports to be an account book kept by the respondent to record its transactions with several customers including the appellants. P2(b) is an English translation of entries in P2(a) relating to transactions with the appellants. According to these entries the appellants were indebted to the respondent in a total sum of \$5,283.25 for goods sold and delivered.

The 1st appellant in his evidence denied that he or his clerk ever ordered and received the goods to the value in question. According to him, when he or his clerk ordered goods, especially for a big project like the building of the Field Force Camp which cost \$4 million, order vouchers would be issued to the supplier. He said he lost copies of these order vouchers when he moved to Johore Bahru and therefore could not produce any of them. He maintained that unless the respondent produced the relevant order vouchers showing that the goods were ordered by him or his clerk, and copies of invoices showing receipt of the goods by them, the appellants are not liable. We will deal with copies of the invoices later in this judgment. As regards order vouchers, whilst PW1 was in the witness box, no question at all was put to him by counsel for the appellants regarding these documents. Whether they were in fact issued or not is in our view of no consequence. Neither side is in a position to produce any of them. Certainly their non-availability is not an evidence to rebut the respondent's case, nor is it a proof that the appellants did not owe the respondent the sum claimed. As order vouchers are not part of the respondent's case, we agree with the observation of the learned judge that the ordering procedure of the appellants is "neither here nor there".

Counsel for the appellants submitted both before the lower court and before us that the respondent's exhibits P2(a) and P2(b) are not admissible as they are not account books within the meaning of section 34 of the Evidence Act and that even if they are admissible they are not sufficient to charge the appellants with liability for the amount. Further, in his evidence, the first appellant maintained that the appellants are not liable unless the respondent produced the duplicate copies of invoices relating to the goods for whose value the appellants were sued. For the purpose of dealing with this submission and contention it is necessary to refer to section 34 of the Evidence Act which is reproduced as follows:—